



IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT MBABANE

REF NO: SWMB 130/10

In the matter between:

TENGETILE NTOMBI NGWENYA

APPLICANT

AND

A. M. WHOLESALERS (PTY) LTD

RESPONDENT

Coram

ARBITRATOR :

**VELAPHI ZAKHELE
DLAMINI**

FOR APPLICANT:

IN PERSON

FOR RESPONDENT:

MR. ASIF RANA

ARBITRATION AWARD

DATE OF HEARING : 2ND AUGUST 2010

VENUE : CMAC HEAD OFFICE, 1ST FLOOR
MBABANE HOUSE, MBABANE

1. DETAILS OF PARTIES AND HEARING

- 1.1 This arbitration hearing was held on the 2nd August 2010, at the premises of the Conciliation, Mediation and Arbitration Commission's offices (CMAC or Commission) at the First Floor Mbabane House, Mbabane.
- 1.2 The Applicant is Tengetile Ntombi Ngwenya, a Swazi female adult of P. O. Box 495 Mbabane. She appeared in person.
- 1.3 The Respondent is A. M. Wholesalers (Pty)Ltd, a duly registered company of P. O. Box A744 Swazi Plaza. The Company was represented by its director Mr. Asif Rana.

2. ISSUES TO BE DECIDED

Whether the Applicant was an employee to whom Section 35 of the Employment Act, 1980 applied.

Whether the Applicant's dismissal was substantively and procedurally unfair.

3. BACKGROUND TO THE DISPUTE

The Respondent is a wholesale supplier of goods or merchandise of any description based in Mbabane. The Applicant commenced service with the Respondent on the 4th January, 2010 as a Salesperson/ Merchandiser, and was dismissed on the 30th January, 2010 on the allegations that her

services were no longer required. At the time of her dismissal, the Applicant earned E1200.00 per month.

3.2 The Applicant reported a dispute for unfair dismissal to the Commission, however the dispute remained unresolved, and a Certificate of Unresolved Dispute No: 326/10 was issued. On the 12th May 2010, the parties requested for arbitration, and I was appointed on the 24th May 2010, to decide the dispute.

3.3 The Applicant is seeking the following terminal benefits; Notice pay (E1200.00), Leave pay (E415.38) and Maximum compensation for unfair dismissal (E14, 400.00).

4. SURVEY OF EVIDENCE AND ARGUMENT

All the evidence and arguments raised by the parties have been considered, but because the IRA 2000 (as amended) requires concise reasons (Section 17(5)), I have only referred to the evidence and arguments that I regard as relevant to substantiate my findings.

4.1 APPLICANT'S CASE

4.1.1 The Applicant was the only witness who testified in support of her case.

- 4.1.2 Tengetile Ngwenya stated that she was employed in March 2009 in Piet Retief, in the Republic of South Africa, by a company called B H Trading.
- 4.1.3 The Applicant's evidence was that she was in continuous employment with B H Trading for nine (9) months until one of its directors, Mr. Sohail Yaqoob informed her that he had formed a new company in Swaziland, and requested her to relocate from Piet Retief to Swaziland with him.
- 4.1.4 Ngwenya stated that she consented to the transfer of her employment contract.
- 4.1.5 It was the Applicant's testimony that in January 2010, she started working for the Respondent(A.M Wholesalers(Pty)Ltd), following a take over of the Respondent by B H Trading, which was now incorporated as B H Investments(Pty)Ltd.
- 4.1.6 However on the 30th January 2010, she was dismissed by the Respondent on the grounds that her services were no longer required.
- 4.1.7 The Applicant stated that at the time of her termination, she had not concluded a written contract of employment with A.M.Wholesalers (Pty)Ltd.
- 4.1.8 Ngwenya argued that because B.H. Trading took over A.M Wholesalers, and since she had consented to the transfer, she considered herself in continuous employment with the Respondent for ten (10) months and as such was protected by Section 35 of the Employment Act 1980.
- 4.1.9 The Applicant contended that even if her services were terminated for operational requirements, the principle of Last In First Out (LIFO),

was not followed, because a certain colleague, Nomvula Dlamini continued to work, after she was dismissed, yet Nomvula was employed after her, by the same directors (Mr. Sohail and Mr. Shah) in Piet Retief.

4.1.10 Ngwenya also argued that she was sure that B H Investments took over A.M Wholesalers, because she observed that the Respondent's bank deposits were written "B H Investments".

4.2 **RESPONDENT'S CASE**

4.2.1 Mr. Asif Rana, the Respondent's co-director gave evidence on its behalf.

4.2.2 The director stated that on the 25th December 2009 he left Swaziland for India on a business trip. He employed Mr. Sohail to look after his business interests, including A.M Wholesalers.

4.2.3 Mr. Rana's evidence was that he did not give Mr. Sohail authority to employ anyone during his absence and that is why upon being advised that the Applicant was employed, in January 2010, he instructed Mr. Sohail to terminate her services and pay her for the days worked.

4.2.4 The director stated that A.M Wholesalers (Pty) Ltd has been in business for ten (10) years, and has also been registered as such for that period. The Respondent's shareholders have not changed ever since.

4.2.5 Mr. Rana produced the following company documents, Form "J", Form "C", a Trading Licence and a Lease Agreement. He submitted

that the Respondent's shareholders were Asif Rana and Hena Yasmin.

4.2.6 The director testified that the Respondent had traded in its registered name from April 2000 to date. He stated that the Lease Agreement was between A. M. Wholesalers (Pty) Ltd (Lessee) and Property Holdings Co (Pty) Ltd (Lessor)

5. ANALYSIS OF EVIDENCE AND ARGUMENT

Section 42 (1) of the Employment Act 1980 provides that, before an employee challenges the termination of her services, she has to prove that Section 35 of the Employment Act applies to her.

Section 35(1) of the Employment Act provides that the Section shall not apply to the following employees;

- a) An employee who has not completed her probationary period in terms of Section 32 of the Employment Act;
- b) An employee who works less than twenty-one (21) hours per week;
- c) An employee who is a member of the immediate family of the employer;
- d) An employee appointed for a fixed term and whose term of service has expired.

The Applicant was unable to produce a letter of engagement neither were Mr. Sohail and Mr. Shah called to give evidence to corroborate her evidence, especially about the sale of A.M Wholesalers (Pty) Ltd to B H Trading.

On the other hand the Respondent has proved that its registered name, which is also the company's trading name, has never changed since it was issued with the Certificate of Incorporation in 2000.

The Respondent has also proved that B H Tradings has never been A.M Wholesalers (Pty) Ltd shareholders since 2000.

The Applicant has failed to prove that there was a transfer of her services from B H Trading to A M Wholesalers.

It is common cause that Mr.Sohail did employ the Applicant in January 2010, when he was temporarily managing A.M Wholesalers.

It is my finding that the Applicant's appointment was not authorised by the director.

I also find that there was no agreement between Mr. Sohail, Mr. Rana and the Applicant for the transfer of her employment contract, from B H Trading to A.M Wholesalers.

It is common cause that the Applicant worked for the Respondent for only one month, and as such she had not completed three (3) months probation before her services were terminated.

I hold that Section 35 of the Employment Act 1980 does not apply to the Applicant. In the circumstance she cannot challenge the termination of her services by the Respondent.

Section 35 (1) (a) was applied by the Industrial Court in the matter between **Stephen Mazibuko v Eagle's Nest (Pty) LTD (IC Case No 225/01)**, where the Court held that, because the Applicant had failed to prove that he was an employee entitled to protection under Section 35 (2)

of the Employment Act, then the provisions of Sections 36 and 42 (2) (a) and (b) of the Employment Act did not apply to him.

The Applicant's claims for Notice pay and Compensation for unfair dismissal ought to be dismissed.

Regarding her claim for Leave pay, I hold that the Applicant is not entitled to same, because I have found that there was no transfer agreement between her previous employers, herself and the Respondent.

Even assuming that the Applicant was claiming leave pay for one day, which would represent her one month's service, she would not be entitled to such leave pay.

Section 123 (1) of the Employment Act 1980, provides that where an employee's service is terminated after three (3) months of service, she is entitled to pro rata leave pay.

The following order is made:

6. **AWARD**

6.1 The Applicant's claims are dismissed.

6.2 There is no order as to costs.

DATED AT MBABANE ON THE _____ DAY OF SEPTEMBER 2010

VELAPHI ZAKHELE DLAMINI
CMAC ARBITRATOR

